EXHIBIT 1
DATE 2/17/09
HB 534

Dear Hon. Campbell:

A few weeks ago you asked me to take a look at your bill to require electronic recordings of felony confessions. Since then I have reviewed HB 534 along with the talking points circulating from the county attorney's association. I understand that yesterday the executive committee of the association decided to oppose the bill because of the issues set forth in these talking points. However, from my perspective it appears that the current language of the bill addresses all of the concerns that are listed.

The first concern is that the bill is contrary to the core concept of a truth-based justice system. The reasoning is essentially that where a statement is deemed admissible by a judge and believable by a jury, it should not be excluded. This is a bold assertion. The notion that limitations placed upon law and justice officials somehow limits the ability of a fact-finder to discover the truth is a stretch. There are all sorts of limits placed upon the prosecution and the investigators precisely because the system is stacked in favor of the State. Miranda warnings, independent blood tests, probable cause determinations, are all examples of limitations placed upon the government. The basis for these limitations are well grounded in the state and federal Constitutions in order to protect against unreasonable searches and coerced confessions. In my view the current language of the bill, while somewhat beyond what is required constitutionally, supports the spirit of the concept of the right to be secure in our person.

This concern is raised with the caveat that prosecutors want confessions. Indeed, confessions make for better cases. Recorded confessions are better yet. Since there is likely widespread agreement on that issue, why then is there opposition to making an ideal the law? I suspect that it has more to do with prosecutors feeling that, if adopted, this bill would send a message to prosecutors and police that their legislators don't trust them. In my view, however, I see nothing in the current bill that makes such a suggestion.

The next issue relates to the current state of case law in the area of confessions, and issues raised in the State v. Lawerence case from 1997. Frankly, I have some difficultly understanding this argument, but I think it essentially boils down again to a trust issue. As far as I can tell, the opponents are saying, "look the courts have already said that trained law enforcement officers should be viewed with suspicion, now the legislature wants to take it a step further and make the statement inadmissible." In reading the text of the bill I don't reach that conclusion. Rather, I read something quite the opposite. Clearly, technology has changed since 1997 when email was just becoming a norm in many places. More importantly, though, I read the text of the bill to refute the Court's characterization of unrecorded confessions as being suspicious. To me the bill suggests that there are those out there who want to cast our practices in a bad light and our response is to say that we are open books and will stand behind our practices.

The third point argues that the bill is an unfunded mandate, requiring poor agencies to invest in fancy equipment. However, the only situation where this argument can be made with a straight face is with respect to in-car cameras, and I have yet to come up with a

hypothetical scenario where the bill would require cameras to be in cars. Digital recorders cost about $100, and require the replacement of a couple triple A batteries every few months. Analog recorders are cheaper. Not a huge cost. The exceptions that rebut the presumption contained in the bill seem to appropriately negate the need for all cars to have cameras.

Finally, the opponents ask. "when does an officer have to start taping? It seems implicit to me that the recorder is turned on at the point when the officer decides that Miranda warnings should be issued. This argument is a red herring. Moreover, the exceptions under the presumption section clear the way for admission of any scenarios that I can imagine.

I support the bill in its current format and reject the association's opposition. I do so only after reviewing the bill and all issues raised by the opponents. I suspect I am not alone among prosecutors. As a prosecutor have an obligation to enforce and ensure the rights of the accused. This bill merely establishes a reasonable check on the power of the government to eliminate any concern regarding the validity of a confession.

By indicating my support for this bill, I in no way suggest that I do not trust law enforcement officers. My closest friends work in law enforcement. I trust them. I prosecute their cases. I respect the work that they do. And at the end of the day I don't want criminal defendants accusing them of misconduct. I view the bill as a liability policy insuring the credibility of honest men and women in law enforcement officers.

Kind personal regards,

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RECENT DEVELOPMENTS

THE CONSEQUENCES OF LAW ENFORCEMENT OFFICIALS' FAILURE TO RECORD CUSTODIAL INTERVIEWS AS REQUIRED BY LAW

THOMAS P. SULLIVAN* & ANDREW W. VAIL**

I. INTRODUCTION

In an Article published in this Journal in 2005, we advocated the enactment of state statutes requiring that interviews of suspects held in custody at police facilities be electronically recorded, and we attached a proposed model statute.[1] After several years of additional research and discussions with numerous law enforcement and legislative personnel, we have revised our proposed statute in one important substantive respect. We have deleted the provision that evidence of an unrecorded interview is presumed inadmissible into evidence when no statutory exception to the recording requirement applies. Instead, we now recommend that the trial judge permit the prosecution to introduce evidence of all unrecorded interviews; if the failure to record is not justified under the law, and if the case is heard by a jury, the judge must give instructions explaining the greater reliability of electronic recordings of custodial interviews as compared to witnesses' testimony about what occurred.

The new model statute is contained in Appendix A.[2] In this Article, we explain the reasons for the change.

II. THE PROVISIONS OF OUR PRIOR MODEL STATUTE.

As relevant here, our 2005 model statute contains the following provisions.

Section 2 provides that all statements made by persons suspected of designated felonies during custodial interviews must be electronically recorded.[3] Section 3 provides that unless recording is excused under the provisions of §§ 4 or 5, unrecorded statements "shall be presumed inadmissible as evidence against the person in any juvenile or criminal proceeding brought against the person."[4] Sections 4 and 5 describe a variety of circumstances under which the recording of custodial interviews is not required. In these cases, the presumption of inadmissibility is overcome, and unrecorded statements may be admitted into evidence.[5]

The presumption of inadmissibility in § 3 was based upon a similar provision contained in the Illinois recording statute,[6] enacted in 2003, which requires, with certain exceptions, that custodial

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[1] Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1141-44 (2005).

[2] We have also made several editorial changes to the model statute, which are designed to bring more clarity to its provisions, but which do not alter its substance.

[3] Sullivan, *supra* note 1, at 1142.

[4] *Id.*

[5] *Id.* at 1142-44.

[6] 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West 2007) (relating to investigations of first degree murder suspects); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2007) (same). The statute took statewide effect in July 2005.

interviews of suspects in first-degree murder investigations be electronically recorded. This was the first mandatory recording law to be enacted by a state legislature.[7]

III. A SUMMARY OF STATUTES AND COURT RULINGS REQUIRING RECORDED CUSTODIAL INTERVIEWS AND THE CONSEQUENCES OF FAILURE TO RECORD AS REQUIRED.

The earliest requirements that custodial interviews be recorded by state law enforcement officials came in a 1985 ruling by the Supreme Court of Alaska, followed almost a decade later by a 1994 decision by the Supreme Court of Minnesota.[8] After the Illinois statute was enacted in 2003, the District of Columbia and six other states—Maine, Maryland, Nebraska, New Mexico, North Carolina, and Wisconsin—have adopted mandatory recording laws applicable to custodial interviews in a variety of felony investigations.[9] In addition, the New Jersey Supreme Court has by rule provided that recordings be made of custodial interviews in named felony investigations,[10] and an opinion of the highest court of Massachusetts[11] has resulted in statewide adoption of the practice of recording custodial interviews.[12]

These statutes and court rulings contain a variety of provisions dealing with when custodial interviews must be recorded, what circumstances excuse the need for recordings, and the consequences of unexcused failures to record. They may be roughly categorized as follows.

A. INADMISSIBILITY INTO EVIDENCE.

The supreme courts of both Alaska and Minnesota have ruled that testimonial evidence of what occurred during a custodial interview will be excluded from evidence if the prosecution is unable to establish a valid excuse for not making an electronic recording.[13] Later decisions of both courts have adopted exceptions that justify non-recording,[14] but neither court has altered its position on inadmissibility.

B. PRESUMED OR POTENTIAL INADMISSIBILITY.

The District of Columbia Code provides that a statement of an accused taken without the required electronic recording is subject to a rebuttable presumption that the statement was involuntary; the presumption may be overcome if the prosecution proves by clear and convincing evidence that it was voluntary.[15]

In Illinois, custodial statements ~~which~~ that are not recorded as required are presumed inadmissible, but the presumption of inadmissibility may be overcome if the prosecution establishes by a preponderance

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[7] Thomas P. Sullivan, Andrew W. Vail & Howard W. Anderson III. *The Case for Recording Police Interrogations*, 34 LITIGATION, Spring 2008, at 30, 35.

[8] *See* Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985) (requiring recording based upon the Alaska Constitution's Due Process Clause); State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994) (requiring recording based on the court's supervisory power). Many other state reviewing courts, while expressing support for recording custodial interviews, have declined to direct law enforcement officers to do so. *See* cases cited in Sullivan, *supra* note 1, at 1137 n.38.

[9] D.C. CODE ANN. §§ 5-116.01-03 (LexisNexis Supp. 2008); ME. REV. STAT. ANN. tit. 25, § 2803-B (2007); MD CODE ANN. CRIM. PROC. § 2-402 (LexisNexis 2008); NEB. REV. STAT. § 29-4501-4508 (effective July 18, 2008); N.M. STAT. § 29-1-16 (Supp. 2008); N.C. GEN. STAT. § 15A-211 (2007); WIS. STAT. ANN. § 972.115 (West 2007). As to the Texas statute, TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2005), see *infra* App. B, n.~~484847xv~~.

[10] N.J. R. CT. R. 3:17.

[11] Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533-34 (Mass. 2004).

[12] A ruling of the New Hampshire Supreme Court in *State v. Barnett*, 789 A.2d 629 (N.H. 2001), is discussed in Appendix B. *See infra* App. B, n.~~444443xi~~. The decision of the Supreme Court of Iowa in *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2007), is discussed *infra* in Part IV.

[13] *See Stephan*, 711 P.2d at 1162; *Scales*, 518 N.W.2d at 592. The ruling in *Scales* is limited to "substantial" violations. *Scales*, 518 N.W.2d at 592.

[14] *See* Sullivan, *supra* note 1, at 1137 n.38 (collecting cases).

[15] D.C. CODE ANN. § 5-116.03 (LexisNexis Supp. 2008).

of the evidence that the statement was voluntarily given and is reliable, based upon the totality of the circumstances.[16]

C. POTENTIAL INADMISSIBILITY COUPLED WITH ALTERNATIVE CAUTIONARY INSTRUCTIONS.

The New Jersey Supreme Court Rule provides that an unexcused failure to record a custodial interview is a factor for the trial court to consider in determining the admissibility of testimony describing the interview. If testimony of a defendant's unrecorded statement is admitted, the trial judge is required to give the jury strongly-worded, cautionary instructions.[17]

The North Carolina statute requires, with certain exceptions, that custodial interviews in homicide investigations shall be electronically recorded in their entirety, unless the Sstate establishes by clear and convincing evidence that there was good cause for failing to record.[18] An unexcused failure to record shall be considered by the court in deciding a motion to suppress and by the court or jury in support of a claim that the defendant's statement was involuntary or is unreliable. If testimony about the unrecorded interview is admitted before a jury, the judge shall instruct the jurors that they may consider evidence of non-compliance with the recording requirement in determining whether the statement was voluntary and reliable.

D. CAUTIONARY JURY INSTRUCTIONS.

The Wisconsin statute provides that, in a jury case, when an exception to the recording requirement is not applicable, the jurors are to be instructed that it is state policy to make recordings of custodial interviews, and that they may consider the absence of a recording in evaluating the reliability of testimony as to what occurred during the unrecorded interviews. Similarly, in non-jury hearings, the judge may consider the absence of a recording in evaluating the evidence relating to the unrecorded interview.[19]

The Nebraska statute provides that "if a law enforcement officer fails to comply with [the recording law], a court shall instruct the jury that they may draw an adverse inference for the law enforcement officer's failure to comply with" the law.[20]

In *Commonwealth v. DiGiambattista*, the Supreme Judicial Court of Massachusetts ruled that when prosecution testimony regarding a non-recorded custodial interview is admitted into evidence, the jury is to be instructed that "the State's highest court has expressed a preference that interrogations be recorded whenever practicable."[21] The court also held that if the defendant claims the statement was made involuntarily, "the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt."[22]

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[16] 705 ILL. COMP. STAT. ANN. 405/5-401.5(d)(f) (West 2007) (relating to minors); 725 ILL. COMP. STAT. ANN. 5/103-2.1(d)(f) (West 2007) (relating to adults).

[17] N.J. R. CT. 3:17(d), (e). The instructions state in part:

> Where there is a failure to electronically record an interrogation, you have not been provided with a complete picture of all of the facts surrounding the defendant's alleged statement and the precise details of that statement. By way of example, you cannot hear the tone or inflection of the defendant's or interrogator's voices, or hear first hand the interrogation, both questions and answers, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel . . . . The absence of an electronic recording permits but does not compel you to conclude that the State has failed to prove that a statement was in fact given and if so, was accurately reported by State's witnesses.

N.J. Judiciary, Criminal Practice Div., Criminal Model Jury Charges, http://www.judiciary.state.nj.us/criminal/juryindx.htm (follow "Statements of Defendant--Police Failed to Electronically Record" hyperlink) (last visited Feb. 3, 2009). These instructions have formed the basis for the instructions we propose in our revised model bill.

[18] N.C. GEN. STAT. §15A-211 (2007).

[19] WIS. STAT. ANN. § 972.115(d)(2) (West 2007).

[20] NEB. REV. STAT. § 29-4505 (effective July 18, 2008).

[21] Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533-34 (Mass. 2004).

[22] *Id.* Following this ruling, the state Attorney General and District Attorneys Association wrote in a September 2006 Justice

E. NO ADVERSE CONSEQUENCES.

The Maine, Maryland, and New Mexico statutes provide no adverse consequence for a failure to follow their statutory recording mandates.[23]

IV. OUR REASONS FOR REVISING OUR MODEL STATUTE BY REMOVING THE PRESUMPTION OF INADMISSIBILITY, AND PROVIDING INSTEAD FOR CAUTIONARY JURY INSTRUCTIONS.

Since drafting our original model statute, we have observed the results of these statutes and court rulings on the practices of law enforcement officials in each of the states discussed above, and we have talked with law enforcement officers, prosecutors, and defense lawyers in all fifty states.[24] We have also appeared before several state legislative committees, law enforcement bodies, and legal organizations to discuss why we favor electronic recordings of custodial interviews and state legislation requiring recordings.[25]

Comment [KSM1]: [KS to TS/AV: We made substantial changes to the formatting, but not the content, of this footnote.]

Based upon the information we have gathered through these contacts, we have concluded that it is neither wise nor necessary to provide that testimony is inadmissible, or presumed or potentially inadmissible, when a custodial interview should have been, but was not, electronically recorded. The better approach is to allow testimony by both prosecution and defense as to what occurred during the unrecorded interviews, but require that trial judges give jury instructions about the legal requirement of electronically recording custodial interviews, and the superior reliability of recordings as compared to testimony about what was said and done.

Our reasons are these.

Initiative Report: "Law enforcement officers shall, whenever it is practical and with the suspect's knowledge, electronically record all custodial interrogations of suspects and interrogations of suspects conducted in places of detention." MASS. DIST. ATTORNEYS ASS'N, REPORT OF THE JUSTICE INITIATIVE 14 (2006). The Massachusetts Chiefs of Police Association, District Attorneys Association, and State Police distributed a sample "Policy and Procedure" to law enforcement agencies throughout the state, ~~in order "to have all law enforcement departments 'on the same page' while waiting for clarification from the courts on many issues left unanswered in *DiGiambattista*."~~ ~~[AQ: We cannot find this quote – is there a citation missing?]~~ The sample reads: "It is the policy of the department to electronically record all custodial interrogations of suspects or interrogations of suspects conducted in places of detention whenever practical." MUN. POLICE INST., POLICY & PROCEDURE NO. 2.17, ELECTRONIC RECORDINGS OF INTERROGATIONS 1, http://www.municipalpoliceinstitute.org/page.php?pageid=68 (follow "2.17 Electronic Recordings of Interrogations.doc" hyperlink) (last visited Jan. 15, 2009).

[23] 25 ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (2007); MD CODE ANN. CRIM. PROC. § 2-402 (LexisNexis 2008); N.M. STAT. § 29-1-16 (Supp. 2008).

[24] We have spoken with more than 600 law enforcement officers—most of them detectives and their supervisors—from police and sheriff departments that make it a practice to record custodial interviews in varying felony investigations. Their enthusiasm and support for the practice is virtually unanimous. Our current list of these departments is attached, *infra*, as Appendix B.

[25] *Legislative*: State Legislative Leaders Found., Univ. of Chi. (June 2004); D.C. City Council Judiciary Comm. (Nov. 2004); Mo. General Assembly Comm. (Nov. 2005); Md. House of Delegates Comms. (Mar. 2006, Jan. 2007); Cal. Comm. on Fair Admin. of Justice (June 2006); Nat'l State Legislators' Conf. (Dec. 2006); New Eng. Legislative Comm. (Feb. 2007); Tenn. Legislative Comm. (Dec. 2007); N.Y. Assembly Comms. (Oct. 2005, Apr. 2008); Tenn. Gen. Assembly Study Comm. (Dec. 2007); Pa. Joint State Gov't Comm'n (Mar. and Aug. 2008); Montana House Judiciary Comm. (Feb. 2009).

Law Enforcement: Short Course for Prosecuting Att'ys (July 2004); Nat'l Ass'n of Criminal Defense Lawyers, Conf. (July 2004); Hennepin County Att'y, Minn. Conf. (Feb. 2005); Int'l. Ass'n. of Chiefs of Police, Annual Meeting (Oct. 2006); Mich. Ass'n. of Chiefs of Police Mid-Winter Meeting (Jan. 2007).

Other: N.C. Leadership Summit (Mar. 2003); Am. Judicature Soc'y (Jan. 2003, Dec. 2004, Aug. 2006); Am. Acad. of Psychiatry and Law, Midwest Conf. (Apr. 2003); Midwest Sociological Soc'y, Annual Meeting (Apr. 2003); Nat'l Lawyers Ass'n., Annual Convention (July 2003); American Bar Ass'n, Midyear Meeting (Feb. 2004); Center for Policy Alternatives (Dec. 2004); State Bar of Tex. (Feb. 2005, Feb. 2006); Nat'l Ass'n of Criminal Defense Lawyers, Annual State Legislative Conf. (Aug. 2005); Nat'l Instit. of Justice (Sept. 2005); Innocence Project Confs. (Mar., 2006, Mar. and June 2007); Cal. Innocence Project, UCLA (Apr. 2006); Pa. Bar Institute, Annual Symposium (June 2006); John Jay School of Criminal Justice (Mar. 2007); Center for Am. and Int'l Law (Aug. 2008); Uniform Law Comm'rs, Drafting Comm. Meeting (Oct. 2008); Ill. Institute for Continuing Legal Educ. Conf., Defending Ill. Death Penalty Cases in 2008 (Nov. 2008).

First, we have concluded that provisions that threaten admissibility of testimony about unrecorded interviews are not necessary in order to achieve compliance with recording laws. So far as we are able to determine, the differences in the consequences for failing to make electronic recordings have not had an impact upon law enforcement agency practices in the states mentioned in Part III.

This is consistent with the enthusiastic support for recording custodial interviews we have heard in our conversations with detectives and their supervisors from small, medium, and large police and sheriff departments in every state. The hundreds of law enforcement officers we have spoken with say that, having given recordings a try, they become enthusiastic supporters of the practice. They record because of the benefits derived, rather than because adverse evidentiary consequences threaten if they fail to record.

When a suspect has confessed or made damaging admissions during a properly conducted electronically recorded custodial interview, the prosecution's case is virtually unassailable. Recordings readily and conclusively refute defense claims that the detectives who conducted the interviews failed to give *Miranda* warnings, used inappropriate tactics to obtain confessions, or are misstating what was said and done during interviews.

Law enforcement personnel also obtain other advantages by recording custodial interviews. A great deal of time is saved by police, prosecutors, and trial judges. Lengthy pretrial and trial hearings about closed-door interrogations, often involving attacks on the integrity of the interviewers, are unnecessary; the tapes contain conclusive evidence as to what took place.

We have also found support for custodial recordings among members of the defense bar because the honesty and sincerity of suspects is often apparent to detectives, and their supervisors, and prosecutors, and helps to prevent unwarranted criminal charges. Another reason that both S~~s~~tate and defense personnel support recordings is that officers who tend to abuse their authority during custodial interviews are weeded out. This has the additional benefit of reducing the incidence of civil suits for money damages.[26]

Additional evidence that a statutory threat of inadmissibility is not needed is illustrated by the reaction of Iowa's chief law enforcement officials after the Iowa Supreme Court's 2007 decision in *State v. Hajtic*.[27] The court expressly declined to direct that custodial interviews be recorded or to order trial judges to give cautionary jury instructions about unrecorded custodial interviews. Rather, the majority opinion stated, "We believe electronic recording, particularly videotaping, of custodial interrogations should be encouraged, and we take this opportunity to do so."[28] This statement prompted the Iowa Attorney General to write in the Iowa State Police Association's publication, "Although the court stated that it is 'encouraging' the practice of electronic recording, the attorney general's office believes that the *Hajtic* decision should be interpreted as essentially requiring this practice."[29]

Second, the inclusion of provisions for inadmissibility has proven to be a major stumbling block in

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[26] At the 2007 mid-winter conference of the Michigan Association of Chiefs of Police, we heard their lawyer endorse recordings of custodial interviews as a way of reducing the threats of civil damage claims that impact the cost of the municipal risk pool. *See* Gene King, *Why Michigan Police Agencies Should Embrace a Policy to Record Certain Custodial Interrogations*, LAW ENFORCEMENT ACTION F. (Mich. Mun. League, Ann Arbor, Mich.), Oct. 2006), *available at* http://www.mmlpool.org/shared/public/publications/leaf_newsletter/recording_interrogations.pdf?PHPSESSID=efac3ddef2879a36efff464d9937eaf8.

[27] *See* State v. Hajtic, 724 N.W.2d 449 (Iowa 2006).

[28] *Id.* at 456. The Court also stated:

> We are aided in our de novo review of this case by a complete videotape and audiotape of the *Miranda* proceedings and the interrogation that followed.
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> * * *
>
> This case illustrates the value of electronic recording, particularly videotaping, of custodial interrogations.

Id. at 454.

[29] Tom Miller, *Cautions Regarding Custodial Issues*, 39 IOWA POLICE J. 15, 15 (2007).

achieving enactment of mandatory recording legislation. We, and others who have supported mandatory recording legislation, have encountered strong opposition from police, sheriffs, prosecutors, and their organizations to provisions that threaten admissibility of testimony about confessions and admissions that should have been recorded. They are concerned that felons will either not be charged or will be acquitted for lack of sufficient evidence of guilt.[30]

We acknowledge that there is merit to their concerns, and these concerns carry considerable weight with governors and state legislators as they deliberate the wisdom of mandatory recording legislation. There is, therefore, a greater likelihood of obtaining favorable consideration of state recording statutes if the proposed bills do not contain provisions that potentially prohibit testimony of unrecorded custodial interviews.

V. CONCLUSION.

These are the considerations that have caused us to alter our model bill by changing the provisions as to the consequences that follow when officers fail to record custodial interviews in violation of the law. Instead of presumed inadmissibility of testimony about those interviews, we have substituted the requirement that instructions be given to jurors drawing attention to the dramatic differences in the value and reliability of testimonial descriptions when compared with electronic recordings of custodial interviews.

[30] This calls to mind Justice Benjamin Cardozo's oft-quoted lament. "The criminal is to go free because the constable has blundered." People v. DeFore, 150 N.E. 585, 587 (N.Y. 1926).

APPENDIX A

MODEL BILL FOR ELECTRONIC RECORDING OF CUSTODIAL INTERVIEWS

Be it enacted by [insert name of legislating body]:

Section 1: Definitions.

(a) "Custodial Interview" means an interview conducted by a law enforcement officer for the purpose of investigating violations of law, of a person who is being held in custody in a Place of Detention, when the interview is reasonably likely to elicit responses that may incriminate the person in connection with a felony under the laws of this state.[31]

(b) "Place of Detention" means a jail, police or sheriff's station, holding cell, correctional or detention facility, office, or other structure located in this state, where persons are held in connection with juvenile or criminal charges.[32]

(c) "Electronic Recording" or "Electronically Recorded" means an audio, video and/or digital electronic recording of a Custodial Interview.

(d) "Statement" means an oral, written, sign language, or other nonverbal communication.

Section 2. Recordings Required.

Except as provided in Section 3, all Custodial Interviews conducted by a law enforcement officer in a Place of Detention shall be Electronically Recorded. The recording shall be an authentic, accurate, uninterrupted, and unaltered record of the interview, beginning with the law enforcement officer's advice of the person's rights, and ending when the interview has completely finished. If a visual recording is made, the camera or cameras shall be simultaneously focused on both the law enforcement interviewer and the suspect.

Section 3. Exceptions.

A Statement need not be Electronically Recorded if the court finds:

(a) The interview was a part of a routine processing or "booking" of the person, or routine border inquiries; or

(b) The interview occurred before a grand jury or court; or

(c) Before or during the interview, the person agreed to respond to the law enforcement officer's questions only if his or her statements were not electronically recorded, and if feasible the person's agreement was electronically recorded before the interview began; or

(d) After having consulted with his or her lawyer, the person agreed to participate in the interview without an electronic recording being made, and if feasible the person's agreement was electronically recorded before the interview began; or

(e) The law enforcement officer in good faith failed to make an electronic recording of the interview because he or she inadvertently failed to operate the recording equipment properly, or without his or her knowledge the recording equipment malfunctioned or stopped operating; or

(f) The interview was conducted outside this state by officials of another state, country, or jurisdiction in compliance with the law of that place, without involvement of or connection to a law enforcement officer of this state; or

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[31] If fewer than all felonies are to be covered, this provision should be revised by inserting statutory citations to the felonies to be covered.

[32] If it is intended to expand the reach of this bill to include interviews of persons who are in custody outside a Place of Detention, delete § 1(b), and delete the words "in a Place of Detention" from §§ 1(a) and 2.

(g) The law enforcement officer who conducted the interview, or his superior, reasonably believed that the making of an electronic recording would jeopardize his safety or the safety of the person to be interviewed, or another person, or the identity of a confidential informant, and if feasible an explanation of the basis for that belief was electronically recorded before the interview began; or

(h) The interviewing law enforcement officer reasonably believed that the crime for which the person was taken into custody and being investigated or questioned was not related to a crime referred to in Section 1(a); or

(i) Exigent circumstances existed which prevented the law enforcement officer from making, or rendered it not feasible to make, an electronic recording of the interview, and if feasible an explanation of the circumstances was electronically recorded before the interview began; or

(j) The Statement is offered as evidence solely to impeach or rebut the person's prior testimony, and not as substantive evidence.

Section 4. Cautionary Jury Instructions.

In the event the prosecution offers an unrecorded Statement into evidence that was required to be Electronically Recorded by the provisions of Section 2, and the court finds the prosecutor has not established by a preponderance of the evidence that an Exception listed in Section 3 is applicable, the trial judge shall, upon request of the defendant, provide the jury with the following cautionary instructions, with changes that are necessary for consistency with the evidence:

"The law of this state required that the interview of the defendant by law enforcement officers which took place on [insert date] at [insert place] was to be electronically recorded, from beginning to end. The purpose of this requirement is to ensure that you jurors will have before you a complete, unaltered, and precise record of the circumstances under which the interview was conducted, and what was said and done by each of the persons present.

"In this case, the interviewing law enforcement agents failed to comply with that law. They did not make an electronic recording of the interview of the defendant. No justification for their failure to do so has been presented to the court. Instead of an electronic recording, you have been presented with testimony as to what took place, based upon the recollections of law enforcement personnel [and the defendant].

"Accordingly, I must give you the following special instructions about your consideration of the evidence concerning that interview.

"Because the interview was not electronically recorded as required by our law, you have not been provided the most reliable evidence as to what was said and done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices.

"Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that what was said and done has been accurately reported by the participants, including testimony as to statements attributed by law enforcement witnesses to the defendant."

Section 5. Handling and Preservation of Electronic Recordings.

(a) Every Electronic Recording of a Custodial Interrogation shall be clearly identified and catalogued by the agency of the recording law enforcement personnel.

(b) If a juvenile or criminal proceeding is brought against a person who was the subject of an Electronically Recorded Custodial Interrogation, the recording shall be preserved by the agency of the recording law enforcement personnel until all appeals, post-conviction, and habeas corpus proceedings are final and concluded, or the time within which they must be brought has expired.

(c) If no juvenile or criminal proceeding is brought against a person who has been the subject of an Electronically Recorded Custodial Interrogation, the recording shall be preserved by the agency of the

recording law enforcement personnel until all applicable federal and state statutes of limitations bar prosecution of the person.

Section 6. Effective Date.

This Act shall take effect on [insert date].

APPENDIX B

DEPARTMENTS THAT CURRENTLY RECORD A MAJORITY OF CUSTODIAL INTERROGATIONS

PD stands for Police Department, DPS for Department of Public Safety, and CS for County Sheriff.

STATE	DEPARTMENTS
Alabama	Mobile CS; Mobile PD; Prichard PD
Alaska	All departments—Supreme Court ruling[33]
Arizona	Casa Grande PD; Chandler PD; Coconino CS; El Mirage PD; Flagstaff PD; Gila CS; Gilbert PD; Glendale PD; Marana PD; Maricopa CS; Mesa PD; Oro Valley PD; Payson PD; Peoria PD; Phoenix PD; Pima CS; Pinal CS ; Prescott PD; Scottsdale PD; Sierra Vista PD; Somerton PD; South Tucson PD; Surprise PD; Tempe PD; Tucson PD; Yavapai CS; Yuma CS; Yuma PD
Arkansas[34]	AR State PD; Eureka Springs PD; Fayetteville FD; Fayetteville PD; 14th Judicial District Drug Task Force; Washington CS; Van Buren PD
California	Alameda CS; Arcadia PD; Auburn PD; Bishop PD; Butte CS ; Carlsbad PD; Contra Costa CS; El Cajon PD; El Dorado CS; Escondido PD; Folsom PD; Grass Valley PD; Hayward PD; LaMesa PD; Livermore PD; Oceanside PD; Orange CO Fire Authority; Orange CS; Placer CS ; Pleasanton PD; Rocklin PD; Roseville PD; Sacramento CS; Sacramento PD; San Bernardino CS ; San Diego PD; San Francisco PD; San Joaquin CS; San Jose PD; San Leandro PD; San Luis PD; Santa Clara CS; Santa Clara PD; Santa Cruz PD; Stockton PD; Sunnyvale DPS; Union City PD; Vallejo PD; Ventura CS; West Sacramento PD; Woodland PD; Yolo CS
Colorado	Arvada PD; Aurora PD; Boulder PD; Brighton PD; Broomfield PD; Colorado Springs PD; Commerce City PD; Cortez PD; Denver PD; El Paso CS; Ft. Collins PD; Lakewood PD; Larimer CS; Logan CS ; Loveland PD; Montezuma CS; Sterling PD; Thornton PD
Connecticut[35]	Bloomfield PD; Cheshire PD; CT State PD Internal

[33]Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985).

[34]In *Clark v. State*, the A~~r~~Krkansas Supreme Court rejected the defendant's argument that she had a constitutional right to have the police make a complete recording of her custodial interview. However, the court ~~cited the New Jersey Supreme Court *Cook* decision which resulted in the court's adoption of a rule requiring that electronic recordings be made of custodial interviews in New Jersey and~~ stated, "[W]e believe that the criminal-justice system will be better served if our supervisory authority is brought to bear on this issue. We therefore refer the practicability of adopting such a rule to the Committee on Criminal Practice for study and consideration." No. 07-1276, 2008 WL 4378096 (Ark. Sept. 25, 2008) (citing State v. Cook, 847 A.2d 530 (N.J. 2004)).

	Affairs Unit
Delaware	DE State PD; New Castle City PD; New Castle County PD
District of Columbia	All departments - statute[36]
Florida	Broward CS; Cape Coral PD; Collier CS; Coral Springs PD; Daytona Beach PD; Ft. Lauderdale PD; Ft. Myers PD; Hallandale Beach PD; Hialeah PD; Hollywood PD; Key West PD; Kissimmee PD; Lee CS; Manatee CS; Margate PD; Miami PD; Monroe CS; Mount Dora PD; Orange CS; Osceola CS; Palatka PD; Pembroke Pines PD; Pinellas CS; Port Orange PD; Sanibel PD; St. Petersburg PD
Georgia	Atlanta PD; Centerville PD; Cobb County PD; DeKalb County PD; Fulton County PD; Gwinnett County PD; Houston CS; Macon PD; Perry PD; Savannah-Chatham PD; Warner Robins PD
Hawaii	Honolulu PD
Idaho	Ada CS; Blaine CS; Boise City PD; Bonneville CS; Caldwell PD; Canyon CS; Cassia CS; Coeur d'Alene PD; Garden City PD; Gooding CS; Gooding PD; Hailey PD; ID Dept Fish & Games; ID Falls PD; ID State PD; Jerome CS; Jerome PD; Ketchum PD; Lincoln CS; Meridian PD; Nampa PD; Pocatello PD; Post Falls PD; Twin Falls PD
Illinois	**All departments:** homicides—statute[37] **Other felonies:** Bloomington PD; Cahokia PD; Caseyville PD; Dixon PD; DuPage CS; East St. Louis PD; Fairview Heights PD; Galena PD; Kankakee CS; Kankakee PD; Macon CS; Naperville PD; O'Fallon PD; Rockton PD; St. Clair CS; Swansea PD; Winnebago CS
Indiana	Albion PD; Allen CS; Atlanta PD; Auburn PD; Carmel PD; Cicero PD; Clark CS; Clarksville PD; Columbia City PD; Dyer PD; Elkhart CS; Elkhart PD; Fishers PD; Floyd CS; Fort Wayne PD; Greensburg PD; Hamilton CS; Hancock CS; Hartford PD; IN State PD; Jeffersonville PD; Johnson CS; Kendallville PD; LaGrange CS; Lowell PD; Montpelier PD; Nappanee PD; Noble CS; Noblesville PD; Schererville PD; Sheridan PD; Shipshewana PD; Steuben CS; Tipton PD; Westfield PD
Iowa[38]	Altoona PD; Ames PD; Ankeny PD; Arnolds Park PD;

[35] In 2008, a CT statute was enacted establishing a Commission on Wrongful Convictions, which is to report its findings and recommendations by July 1, 2009 to the General Assembly, including an evaluation of the implementation of "the pilot program to electronically record the interrogations of arrested persons." 2008 Conn. Legis. Serv. P.A. 08-143 (H.B. 5933) (WEST).

[36] D.C. CODE ANN. §§ 5-116.01-03 (LexisNexis Supp. 2008).

[37] 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West 2007); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2007); 720 ILL. COMP. STAT. ANN. 5/14-3(k) (West Supp. 2008).

[38] Following the ruling of the Supreme Court ~~of Iowa~~ in *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2006), the ~~Iowa~~ Attorney General wrote in the ~~Iowa~~ State Police Association's publication:

	Benton CS; Bettendorf PD; Cedar Rapids PD; Council Bluffs PD; Davenport PD; Des Moines PD; Fayette CS; Fayette County PD; Iowa City PD; Iowa DPS; Johnson CS; Kossuth CS; Linn CS; Marion PD; Marshalltown PD; Muscatine PD; Nevada PD; Parkersburg PD; Polk CS; Pottawattamie CS; Sioux City PD; Vinton PD; Waterloo PD; Waverly PD; Woodbury CS
Kansas	Kansas Univ. DPS; Liberal PD; Ottawa PD; Sedgwick CS; Wichita PD
Kentucky	Elizabethtown PD; Hardin CS; Jeffersontown PD; Louisville Metro PD; Louisville PD; Oldham CS; St. Matthews PD
Louisiana	Lafayette City PD; Lake Charles PD; Oak Grove PD; Plaquemines Parish CS; St. Tammany Parish CS
Maine	All departments—statute[39]
Maryland	All departments - statute[40]
Massachusetts[41]	Barnstable PD; Boston PD; Bourne PD; Brewster PD; Cambridge; Chatham PD; Dennis PD; Easton PD; Edgartown PD; Fall River PD; MA State PD; North Central Correctional Inst.; Oak Bluffs PD; Orleans PD; Pittsfield PD; Revere Fire Dept.; Somerset PD; Tewksbury PD; Troro PD; West Tisbury PD; Yarmouth PD
Michigan	Auburn Hills PD; Benzie CS; Big Rapids DPS; Bloomfield Hills DPS; Cass County Drug Enforcement Team; Cass County CS; Charlevoix CS; Detroit PD (homicides); Emmet CS; Farmington DPS; Gerrish Township PD; Gladwin PD; Huntington Woods DPS; Isabella CS; Kent CS; Kentwood PD; Lake CS; Ludington PD; Manistee CS; Mason CS; Mecosta CS; MI State PD; Milford PD; Mt. Pleasant PD; Novi PD; Oak Park DPS; Onaway PD; Paw Paw PD; Redford Township PD; Scottville PD; Troy PD; Waterford PD;

"Although the court stated that it is 'encouraging' the practice of electronic recording, the attorney general's office believes that the *Hajtic* decision should be interpreted as essentially requiring this practice." Miller, *supra* note 29, at 15.

[39]ME REV. STAT. ANN. title 25, § 2803-B(1)(K) (2007).

[40]The MD~~Maryland~~ Code of Criminal Procedure directs that law enforcement units shall make "reasonable efforts" to create a recording of custodial interviews of suspects in connection with cases involving named felonies "whenever possible." MD CODE ANN. CRIM. PROC. § 2-401-04 (LexisNexis 2008).

[41]Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533-34 (Mass. 2004). Following this ruling, the state Attorney General and District Attorneys Association wrote in a September 2006 Justice Initiative Report: "Law enforcement officers shall, whenever it is practical and with the suspect's knowledge, electronically record all custodial interrogations of suspects and interrogations of suspects conducted in places of detention." MASS. DIST. ATTORNEYS ASS'N, *supra* note 22, at 14. The ~~Massachusetts~~ Chiefs of Police Association, District Attorneys Association, and State Police distributed a sample "Policy and Procedure" to law enforcement agencies throughout the state, which states~~reads~~: "It is the policy of the department to electronically record all custodial interrogations of suspects or interrogations of suspects conducted in places of detention whenever practical." MUN. POLICE INST., *supra* note 22, at 1.

	West Branch PD
Minnesota	All departments—Supreme Court ruling[42]
Mississippi	Biloxi PD; Cleveland PD; Gulfport PD; Harrison CS; Jackson CS
Missouri	Lake Area Narcotics Enforcement Group; Platte CS; St. Louis County Major Case Squad; St. Louis County PD
Montana	Billings PD; Bozeman PD; Butte/Silverbow LED; Cascade CS; Flathead CS; Gallatin CS; Great Falls PD; Helena PD; Kalispell PD; Lewis & Clark CS; Missoula PD; Missoula CS
Nebraska	All departments - statute[43]
Nevada	Boulder City PD; Carlin PD; Douglas CS; Elko CS; Elko PD; Henderson PD; Lander CS; Las Vegas Metro PD; Nevada DPS; North Las Vegas PD; Reno PD; Sparks PD; Washoe CS; Wells PD; Yerington PD
New Hampshire[44]	Carroll CS; Concord PD; Conway PD; Enfield PD; Keene PD; Laconia PD; Lebanon PD; Nashua PD; NH State PD; Plymouth PD; Portsmouth PD; Swanzey PD
New Jersey	All departments—Supreme Court Rule[45]
New Mexico	All departments—statute[46]
New York	Binghamton PD; Broome CS; Cayuga Heights PD; Delaware CS; Deposit PD; Dryden PD; Endicott PD; Greece PD; Glenville PD; Irondequoit PD; NY State PD— Ithaca; NY State PD— Oneonta; NY State PD— Sidney; Rotterdam PD; Schenectady PD; Tompkins CS; Vestal PD
North Carolina	**All departments:** homicides—statute[47] **Other felonies:** Burlington PD; Concord PD; Wilmington PD
North Dakota	Bismarck PD; Burleigh CS; Fargo PD; Grand Forks CS; Grand Forks PD; Valley City PD
Ohio	Akron PD; Brown CS; Cincinnati PD; Columbus PD; Dawson CS; Dublin PD; Franklin PD; Garfield Heights PD; Grandview Heights PD; Grove City PD; Hartford PD; Hudson PD; Millersburg PD; OH Board of Pharmacy; OH State Univ. PD; Ontario PD; Reynoldsburg PD; Upper Arlington PD; Wapakoneta PD; Warren CS; Westerville PD; Westlake PD; Worthington PD
Oklahoma	Moore PD; Norman PD; Oklahoma CS; Tecumseh PD

[42]State v. Scales, 518 N.W.2d 587, 591-92 (Minn. 1994).

[43]NEB. REV. STAT. § 29-4501-4508 (effective July 18, 2008).

[44]In *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2001), the Supreme Court ~~of New Hampshire~~ held that if an electronically recorded statement is offered into evidence, the recording is admissible only if the entire post-*Miranda* interrogation interview was recorded. The ruling does not require that custodial interviews be recorded either in whole or in part. *Id.* at 632. Further, if a partially recorded statement is excluded from evidence because the entire interview was not recorded, testimonial evidence is nevertheless admissible as to what occurred before, during, and after the custodial interview, including the portion that was recorded. *Id.* at 632-33.

[45]N.J. R. CT. 3:17.

[46]N.M. STAT. § 29-1-16 (Supp. 2008).

[47]N.C. GEN. STAT. § 15A-211 (2007).

Oregon	Bend PD; Clackamas CS; Coburg PD; Douglas CS; Eugene PD; Lincoln City PD; Medford PD; Ontario PD; OR State PD, Springfield; Portland PD; Roseburg PD; Salem PD; Warrenton PD; Yamhill CS
Pennsylvania	Bethlehem PD; ~~Tredyffrin Township PD;~~ Whitehall PD
Rhode Island	Woonsocket PD
South Carolina	Aiken CS; Aiken DPS; N. Augusta DPS; Savannah River Site Law Enf.
South Dakota	Aberdeen PD; Brown CS; Clay CS; Lincoln CS; Mitchell PD; Sioux Falls PD; SD State Div. of Criminal Investigations; Vermillion PD
Tennessee	Blount CS; Bradley CS; Brentwood PD; Chattanooga PD; Cleveland PD; Goodlettsville PD; Hamilton CS; Hendersonville PD; Loudon CS; Montgomery CS; Murfreesboro PD; Nashville PD
Texas[48]	Abilene PD; Arlington PD; Austin PD; Burleson PD; Cedar Park PD; Cleburne PD; Collin CS; Corpus Christi PD; Dallas PD; Duncanville PD; Florence PD; Frisco PD; Georgetown PD; Granger PD; Harris CS; Houston PD ; Hutto PD; Irving PD; Johnson CS; Kileen PD; Leander PD; Midland PD; Parker CS; Plano PD; Randall CS; Richardson PD; Round Rock PD; San Antonio PD; San Jacinto CS; Southlake DPS; Sugar Land PD; Taylor PD; Travis CS; Webster PD; Williamson CS
Utah[49]	Layton PD; Salt Lake City PD; Salt Lake CS; Utah CS
Vermont	Burlington PD; Norwich PD; Rutland PD
Virginia	Alexandria PD; Chesterfield County PD; Clarke CS; Loudoun CS; Richmond PD
Washington	Adams CS; Arlington PD; Bellevue PD; Bothell PD; Buckley PD; Columbia CS; Ellesburg PD; Federal Way PD; Kennewick PD; Kent City PD; King CS; Kirkland PD; Kittitas CS; Klickitat CS; Lewis CS; Marysville PD; Mercer Island PD; Mount Vernon PD; Pierce CS; Prosser PD; Snohomish CS; Thurston CS; Univ. WA PD; Walla Walla PD; WA State Patrol; Yakima CS

[48]The T<u>X</u>~~exas~~ Code of Criminal Procedure provides that a defendant's oral statement is inadmissible if it is not recorded, unless the statement "contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused . . . ." TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2005); *see* Moore v. State, 999 S.W.2d 385, 400 (Tex. Crim. App. 1999). The statute requires neither recording of custodial interviews preceding recorded statements nor exclusion of suspects' unrecorded written statements. *See* Rae v. State, No. 01-98-00283-CR, 2001 WL 125977, at *3 (Tex. App. Feb. 15, 2001); Franks v. State, 712 S.W.2d 858, 860 (Tex. App. 1986).

[49]The U<u>T</u>~~tah~~ Attorney General has adopted a Best Practices Statement, endorsed by all state law enforcement agencies, recommending that custodial interrogations in a fixed place of detention of persons suspected of committing a statutory violent felony should be electronically recorded from the *Miranda* warnings to the end in their entirety. Various exceptions to the requirement are included. <u>OFFICE OF THE ATTORNEY GEN., STATE OF UTAH, BEST PRACTICES STATEMENT FOR LAW ENFORCEMENT (2008), *available at* http://attorneygeneral.utah.gov/cmsdocuments/Electronic_Recording.pdf.</u>

West Virginia	Charles Town PD; Morgantown PD; Wheeling PD
Wisconsin	All departments—statute[50]
Wyoming	Cheyenne PD; Gillette City PD; Laramie CS; Laramie PD

[50]WIS. STAT. ANN. §§ 968.073, 972.115 (West 2007).

EXHIBIT 1
DATE 2/19/09
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The Case for Recording Police Interrogations

by Thomas P. Sullivan, Andrew W. Vail, and Howard W. Anderson III

The power of a defendant's confession of guilt is obvious. The Supreme Court long ago recognized that a confession, "if freely and voluntarily made, is evidence of the most satisfactory character." *Hopt v. Utah*, 110 U.S. 574, 584 (1884). A confession deserves "'the highest credit, because it is presumed to flow from the strongest sense of guilt . . .'" *Id.*, quoting *King v. Warickshall*, 1 Leach 263.

But in recent years, we have seen a growing number of DNA exonerations involving defendants who falsely confessed guilt while they were being interrogated. Now we are confronted with the uncomfortable reality that many of these out-of-court confessions did not receive adequate judicial scrutiny. Why? Because the judges and juries did not know exactly what the defendants said, and who did what, leading up to those confessions.

Although our criminal justice system never will be infallible, we are obliged to embrace reforms that help bring the true perpetrators to justice and prevent the innocent from being convicted. This obligation is all the more pressing when a simple, proven reform is available. One reform that will prevent convictions based on false confessions is the electronic recording of stationhouse interrogations of felony suspects.

Recording interrogations at the stationhouse, beginning with the *Miranda* warning, is a commonsense, easy way to identify false confessions. A recorded interrogation provides other benefits as well, as hundreds of police and sheriff's departments across the country will attest. Given the growing recognition of those benefits, we predict that one day soon all law enforcement departments in the United States will record their custodial interrogations electronically. The last holdouts may be those who ought to be in the forefront: agencies of the federal government. Sad to say, the Department of Justice recently failed to authorize a proposed one-year statewide pilot program in Arizona to test the effectiveness of electronic recordings of custodial interrogations.

Most custodial interviews are conducted by law enforcement personnel using lawful techniques, and most suspects who confess to crimes do so voluntarily, truthfully acknowledging their guilt. But the growing number of convicted defendants exonerated by DNA evidence, along with recent social science research, forces us to conclude that a significant minority of suspects falsely confessed to crimes they did not commit, despite the panoply of procedural protections that our criminal justice system provides—including the right to remain silent, the right to retained or appointed counsel, the right to confront witnesses, the presumption of innocence, and the requirement of proof beyond a reasonable doubt. Their convictions usually appear solid because they are based on the perceived strength and credibility of confession evidence.

While it may be hard to believe that an innocent person would confess to a crime that he did not commit, the statistics of proven false confessions should give us all pause:

- The Innocence Project, which looked at 130 post-conviction exonerations of people whose DNA conclusively proved them innocent, reports that 35 of those cases (27 percent), involved false confessions. Innocence Project, "Causes and Remedies of Wrongful Convictions," www.innocenceproject.org/causes.
- Professors Steven Drizin and Richard Leo conducted a study of 125 confessions in felony investigations that were proven false because the real perpetrator was subsequently apprehended and convicted. Forty-one suspects (35 percent) confessed to and were convicted of crimes they did not commit. *See* Steven A. Drizin & Richard Leo, "The Problem of False Confessions in a Post-DNA World," 2004 N.C. L. Rev. 892, 951 (2004).

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A well-known example of multiple false confessions in the same case arose out of a police investigation following the discovery of a young female jogger who had been raped and left for dead in New York City's Central Park in 1989. The police quickly turned their suspicion on five teenagers who already were in custody in connection with other assaults in Central Park that same night. After being subjected to extensive unrecorded questioning sessions, and after being kept awake for up to two days, all five suspects gave statements to the police, all but one on videotape and all but one with an adult present. The confessions were full of inconsistencies as to the specifics of the crime. For example, they did not agree on who instigated the attack, who caused the most injuries, who had intercourse with the victim, and what weapons were used. At trial, the defendants unsuccessfully claimed that their statements were coerced during the pre-recorded portion of their interrogation, and they denied making several inflammatory off-camera statements attributed to them by the police. The jury was not swayed, and the young men were convicted, notwithstanding the lack of physical evidence or an eyewitness identification. *See* Susan Saulny, "Why Confess to What You Didn't Do?," *N.Y. Times*, Sec. 4, at 5 (Dec. 8, 2002).

Years later, in 2002, after new evidence was uncovered, the Manhattan district attorney recommended that the convictions be vacated. DNA testing implicated a man who had used the same modus operandi to rape another woman in Central Park a few days earlier in 1989. He subsequently confessed to the crime. The five young men were released from custody after serving years in jail.

Psychologists who study cases like this have found that several different reasons lead innocent people to confess to crimes they did not commit. One useful and often-cited scientific study authored by Saul M. Kassin and Gisli H. Gudjonsson, "The Psychology of Confessions: A Review of the Literature & Issues," 5 *Psych. Science in the Pub. Interest* 33, 49-50 (Nov. 2004), offers the following classification of false confessions:

Compliant false confessions. People will confess to a crime that they did not commit because they believe that the short-term gains of a confession will outweigh the long-term costs. In the Central Park jogger case, for example, the five youths said they confessed because each believed he could go home afterward. When denials of guilt did not stop the interrogation, they instead offered admissions of guilt. Other suspects may confess because they are hungry and want to eat or are frightened and want to speak with their families. Still others may confess out of an expectation of leniency that will accompany a confession. Those who most typically fall into this category—the young, the socially dependent, the mentally handicapped, and the desperate—often have a desire to please authority figures like police officers and prosecutors.

Voluntary false confessions. Some people will confess to a crime they did not commit with very little police prompting. They may be unable to distinguish fantasy from fact. In some instances, they may desire to protect the real criminal. Others may have an irrational desire for publicity. For example, more than 200 people came forward to confess to having kidnapped Charles Lindbergh's baby in 1932. In 2006, John Mark Karr confessed to being involved in the rape and murder of JonBenet Ramsey, a young girl whose unsolved 1996 murder has been widely publicized. After he was arrested overseas and brought back to the United States, local prosecutors asked the court to drop the arrest warrant against him despite his "own repeated admissions" because DNA tests failed to link him to the crime. *See* Julie Bosman, "Reflection and Red Faces after the Ramsey Storm," *N.Y. Times*, Sec. E, at 2 (Aug. 30, 2006).

Internalized false confessions. Other people may, in the course of an interrogation, come to believe that they did what the police claim they did. In the interrogation room, isolated from external reality cues and under enormous stress, exhausted and disoriented suspects are especially vulnerable when the police—as they are allowed to do in most jurisdictions—confront them with false evidence, which may include statements like: "We found your DNA under the victim's fingernails," "a witness places you at the scene," "your friend in the next room says you were the shooter," "your fingerprints are on the gun," or "you failed the lie detector test."

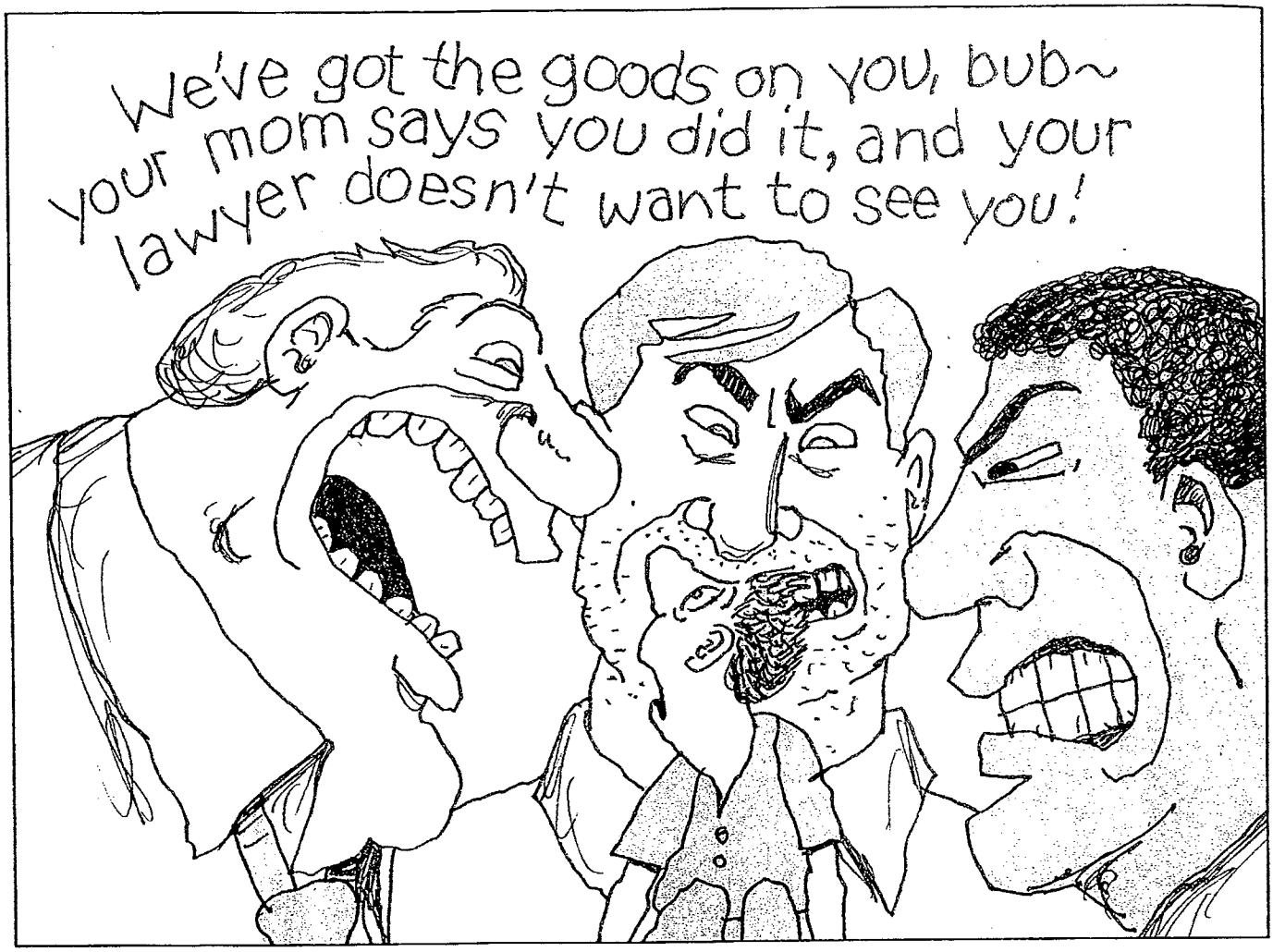
False confessions typically result from a combination of subtle factors.

The suspect begins with denials ("I didn't do it"), then engages in self-doubt ("I don't think I did it"), then converts ("I must have done it"), and eventually completely internalizes the claim ("I did it").

A classic example of the internalized false confession comes from Escondido, California, where the police told a 14-year-old boy named Michael Crowe that his hair was found in his murdered sister Stephanie's hands, that he had failed a lie detector test, that the house where the murder occurred had been locked at the time (thus excluding an intruder), and that Stephanie's blood was found in his bedroom. None of these statements was true. The police convinced Michael that he had a split personality: while "good Michael" could not remember the crime, "bad Michael" had killed his sister. Eventually, he confessed: "I'm not sure how I did it. All I know is I did it." Despite his confession, the charges were dropped. *See, e.g.*, Sharon Begley, "Criminal Injustice," *Wall Street Journal* (Oct. 2005), at http://wsjclassroom.com/archive/05oct/poli_confession.htm. The police later located a mentally ill transient in the area named Richard Tuite, who had Stephanie's blood on his clothing. Eventually, he was convicted of the crime. *See* Greg Moran, "Tuite Enters Guilty Plea on Escape Charge," *San Diego Union-Tribune*, Sec. B, at 1 (Sept. 9, 2004).

Recording custodial interviews, from start to finish, will not guarantee that innocent suspects who make false confessions will not be prosecuted or convicted. These confessions typically result from a combination of many subtle factors. But a complete electronic record of interrogations, along with the help of psychologists and psychiatrists, will make it easier for investigators and prosecutors to determine which confessions are truthful and which are not.

In *Miranda v. Arizona*, the Supreme Court held that the government may not use any statements made during a "cus-



todial interrogation" against a felony suspect without proof that the police told the suspect about certain constitutional rights: that the suspect has the right to remain silent, that any statements made may be used against him, that he has the right to a lawyer during any part of the interrogation, and that a lawyer will be appointed for him if he cannot afford to hire one. 384 U.S. 436, 444 (1966). The requirement for the *Miranda* warnings is triggered when a suspect is subjected to "questioning initiated by law enforcement officers after . . . [having] been taken into custody or otherwise deprived of his freedom of action in any significant way." A formal arrest is not required. Determining whether a suspect was in custody at the time that he was questioned requires an examination of all attendant circumstances, including consideration of "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Stansbury v. California*, 511 U.S. 318, 325 (1994). A waiver of the right against self-incrimination is valid only if it was "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). For example, the police may not falsely tell the suspect that his lawyer does not want to see him. *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964).

Arrested suspects, especially indigents, waive their *Miranda* rights with great frequency and agree to answer custodial questions without a lawyer. According to one study, more than 83 percent of observed suspects agreed to be questioned by police without a lawyer. Paul G. Cassell & Bret S. Hayman, "Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda," 43 *UCLA L. Rev.* 839, 860 (1996).

After the police obtain a valid waiver of *Miranda* rights, any statements made by the suspect as the result of the interrogation may be used against him in a criminal prosecution. This is true unless and until the suspect invokes his right to remain silent or requests a lawyer, and so long as the police do not use unlawful tactics during the interview. Statements have been rendered involuntary by proof of actual or threatened violence, or by deprivation of food, water, or sleep for extended periods of time. Psychological coercion, which implicates factors like the length of the interrogation and the age, intelligence, and psychological makeup of the suspect, can render a statement involuntary, as can promises of leniency, warnings of especially harsh legal treatment, and threats to tell the prosecutor that the suspect refused to cooperate.

While physical and psychological coercion are not permitted in the interrogation room, federal law and the law in most states permit the police to use certain "sophisticated" interrogation techniques to obtain confessions. Chief among these, as noted above, is deception or trickery, often in the form of lies about evidence indicating the suspects' guilt. For example, courts have generally refused to suppress confessions obtained after the police falsely stated that the suspects' fingerprints were found at the scene, or that witnesses had iden-

tified the suspect. *Lucero v. Kerby*, 133 F.3d 1299, 1311 (10th Cir. 1998). Courts also have permitted the police to display false sympathy for the suspect and to minimize the moral significance of the crime. *United States v. Montanez*, 186 F. Supp. 2d 971, 979 (E.D. Wis. 2002). But deception, when taken to the extreme, may render a statement involuntary. In *Leyra v. Denno*, 347 U.S. 556, 559-61 (1954), for example, an undercover police psychiatrist treating the suspect's painful sinus infection while questioning him about the crime rendered the statement involuntary. In *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963), false statements to a mother that her ability to retain custody of her children and her state financial aid depended on her cooperation with the police made her confession involuntary.

Because so much of the law governing the admissibility of a suspect's statement at trial depends on the detailed facts and circumstances under which the statement was made, it is imperative that both trial and reviewing courts be able to reconstruct accurately what occurred behind the closed doors of the interrogation room. In almost every instance of custodial questioning, law enforcement officers can accurately record what was said and what happened with electronic audio or video equipment that preserves everything from the *Miranda* warnings to the conclusion of the interviews. Electronic recordings significantly increase the chance of discovering false confessions before innocent persons are charged, tried, and perhaps convicted. They can also prove the opposite—that the required warnings were given to the suspects, who then confessed voluntarily, openly, and apparently truthfully.

Without complete electronically recorded interrogations, expensive and time-consuming disputes often arise over what occurred in police interrogation rooms. In the face of their incriminating statements, defendants frequently contend that detectives failed to give them the required *Miranda* warnings; that the police continued questioning them after they invoked the right to counsel; that officers used improper physical or psychological tactics to elicit incriminating statements; that the officers made impermissible threats or promises; and that they misstated or exaggerated what was said or done.

When a motion to suppress the defendant's statement is made, a pretrial hearing typically is held in which participants give testimonial versions of what occurred. If after hearing conflicting testimony, the trial judge rules that an unrecorded statement is admissible, the defendant is permitted to present the same issue to the jury at trial—so the same ground is plowed again. If a guilty verdict is returned, the issue often becomes a basis for appeal, and the reviewing court is confronted with transcripts containing opposing versions of the closed-door interrogation session. If the trial or appellate court credits the defense version, a suit for civil damages may result, in which case the contradictory evidence as to what occurred during the custodial interrogation will be heard once more.

A high-profile case in Chicago, in which four young black men were wrongfully convicted, illustrates the waste of resources that failing to record interrogations can cause. A young medical student, Lori Roscetti, was found murdered on railroad tracks on Chicago's South Side in 1986. The "Roscetti Four" were arrested. Two of them made confessions that implicated all four. They claimed in pretrial motions to suppress that Chicago police detectives physically abused them during their interrogations. After a hearing, the motions were denied. They presented their torture claims—the same ones that the judge had considered—to the criminal trial jury, but they were convicted based largely on the confessions. They brought several post-conviction challenges to their convictions, including attacks on the confessions; all were denied. The four convicted defendants spent nearly 15 years in jail, until DNA exonerated them in 2001. The Illinois governor pardoned them in 2002. The actual perpetrators were located, arrested, convicted, and sent to prison, where they should have been from the outset. The Roscetti Four filed civil suits against the detectives, the prosecutors, and the city. After extensive factual and expert discovery, primarily focused on what occurred during the unrecorded interviews, the city settled the claims for over $10 million.

Several years ago, we became interested in ways to reduce the incidence of false confessions that lead to wrongful convictions and continued freedom for the perpetrators. In reviewing articles recommending that custodial interviews of felony suspects be electronically recorded, we noted that virtually all the authors argued that recordings were necessary in order to prevent police from abusing prisoners or falsely reporting and testifying about what suspects said. These assertions were contrary to our views; we believed (and still believe) that the vast majority of law enforcement officers conduct themselves in accordance with the law, report accurately, and testify truthfully about what they recall. We decided to speak directly with officers who electronically record complete custodial interrogations, usually detectives, and learn what they had to say.

We started our investigation knowing that some years back the Supreme Courts of Alaska and Minnesota had mandated statewide electronic recordings, from *Miranda* warnings to the end of the interviews. We also telephoned ten departments in other states that recorded complete interviews. We did not conduct a survey; rather, as we made our phone calls to these police and sheriff departments, we asked for leads to other departments that recorded complete custodial interviews.

Recordings capture reactions and nuances that later testimony cannot possibly reproduce.

Our calls over the past five years to hundreds of state and local law enforcement agencies, in every state, have yielded impressive results. We have spoken to officers from more than 600 police and sheriff departments that electronically record—by audio, video, or both—the entirety of most of their stationhouse interviews in serious felony investigations, starting with the *Miranda* warnings. The means of recording vary from inexpensive tape recorders to sophisticated computer systems that allow for video access and digital storage. We also spoke to departments that do not record. From the hundreds that do record—many for over a decade—we heard with amazing consistency about the multiple benefits these recordings provide to law enforcement officers, prosecutors, courts, and in many instances to the suspects. What we heard rebuts the hypothetical objections raised by non-recording

departments. None of the officers who had experience with electronic recordings would voluntarily return to reliance on handwritten notes (often inaccurate and incomplete), and efforts at reconstructing through later testimony what occurred during the interviews. Many expressed surprise that there are departments not making use of modern recording technology.

Here is a summary of the benefits provided by recording complete custodial interviews:

- Recordings protect against baseless charges of improper police conduct. Complete electronic recordings of everything that transpired in the interrogation room, from the initial *Miranda* warnings to the end, preclude unfounded claims that the officers failed to give the warnings, refused requests for lawyers, engaged in physical or psychological abuse, or used other unlawful tactics to extract a confession. As an officer from the El Dorado, California, county sheriff's office said, "A motion to suppress is a swearing match between the suspect's word and the officer's word. Now we play the tape and the judge says, 'It's right there! Motion denied.'" Another officer, from the Collier County, Florida, sheriff's office, reported that with the help of a videotape of an interrogation he was able to refute allegations that he used a rubber hose on the defendant—allegations that, if a judge had believed them, would have resulted in the suppression of the confession and subjected the officer and his employer to civil liability and subjected the officer to removal from the force. It is not surprising that municipal risk pools have begun to endorse police recordings as an effective way to reduce civil damage claims and awards. *See* Gene King, "Why Michigan Police Agencies Should Embrace a Policy to Record Certain Custodial Interrogations," *Law Enforcement Action Forum News*, Vol. 13, Issue 3, at 4 (Oct. 2006).

- Recordings capture reactions and nuances that later testimony cannot possibly reproduce, such as suspects' facial expressions, indicia of evasion or remorse, or direct, honest responsiveness. A detective from the Nashville, Tennessee, metropolitan police department said that defense claims that stress or pressure caused the defendant to falsely confess evaporated when a videotape showed a calm and collected suspect throughout the questioning.
- Recordings allow officers to focus on the suspect's answers to questions rather than on notetaking. Many lawyers have learned through taking depositions in civil cases that if they try to write everything the deponent says, they are impaired in effectively processing the testimony and observing the witness's demeanor. This in turn affects the thrust, pace, force, and quality of questioning. Experienced lawyers, knowing that the testimony is being recorded by a court reporter or recording device, focus on listening and observing the witness, perhaps making a few notes for follow-up questions. Experienced detectives who electronically record their interviews take the same approach: they concentrate on the suspects' demeanor and responses, looking for indicia of truthfulness or evasiveness. They are better able to develop rapport with suspects by maintaining eye contact, making it more likely that they will receive responsive information. Indeed, we have been told that suspects often become nervous when detectives scribble numerous notes, which is unnecessary when a recording device is used.
- Recordings make it easier for some suspects to confess, because many of them find it easier to admit verbally to committing a crime, rather than writing out or signing a written confession.
- Recordings deter improper police conduct during custodial interviews. A detective from the Kentwood, Michigan, police department said, "I think as the investigator, it keeps you in check knowing the video may be seen by a judge or jury."
- Many departments have recording equipment that permits officers outside the interrogation room to observe interviews in "real time" by remote video hookup, and to relay helpful suggestions to the questioners. One sheriff's deputy in Randall County, Texas, reported, "I often ask another officer to watch the interview to see what I am missing."
- The number of motions to suppress custodial statements has been dramatically reduced, and eliminated completely in some jurisdictions. When interviews have been recorded, defense attorneys seldom file motions to suppress statements on voluntariness or *Miranda* violation grounds—the statements and conduct of both detectives and suspects are incontestable. This relieves detectives from having to engage in courtroom swearing matches. An officer from Elizabethtown, Kentucky, observed that recordings put an end to hostile defense cross-examinations designed to disparage the officer's memory of what

was said and done during custodial interviews, and precluded questions about the officer's conduct during the interrogations. In the words of another officer from the Houston, Texas, police department, officers cannot be accused of "changing what the suspect said." The resulting benefits allow police personnel to devote themselves to other cases, and save substantial amounts of prosecutorial and judicial time.

- Prosecutors and police across the country confirm a direct relationship between the recorded stationhouse interviews that contain confessions or damaging admissions and the increased numbers of guilty pleas. Here again, the expenditure of time of all concerned in contested trials is avoided.
- Another result is an increased incidence of guilty verdicts for those cases that go to trial, because the recordings eliminate entire lines of defense and afford judges and juries an opportunity to observe defendants before they have been prepared for trial. When a composed suspect is seen or heard voluntarily admitting guilt, the verdict is usually a foregone conclusion.
- On the other hand, if detectives have conducted themselves in a manner that goes outside the law, and impinge on the rights or overcome the willpower of suspects, the judge and jury will have a first-hand look, and the advantage shifts to the defense.
- Detectives with whom we have spoken often review recordings of their interrogations to look for clues they did not observe during the session, as well as for self-evaluation and training. An officer in Oak Grove, Louisiana, told us that young officers like to review tapes of more experienced officers as a way to improve their own techniques. According to a detective from Coeur d'Alene, Idaho, experienced detectives benefit from reviewing tapes of others in order to learn "new angles, themes, and techniques" for use in interrogations. Supervising officers in the Elkhart, Indiana, police department use recordings when evaluating detectives' job performances.
- Recordings improve the public perception of the police. The news media, television, and Hollywood routinely depict law enforcement officers acting outside the bounds of the law when interviewing arrested suspects. Recordings counter this misinformation. Many detectives who we have interviewed, particularly those in large metropolitan areas, say recordings increase public trust in police conduct because they show that the police have nothing to hide.
- The practice of recording interrogations also permits psychologists and psychiatrists, for both the prosecution and the defense, to look for indicators of truthful or false confessions. They show whether the police provided the suspect with details of the crime that only the perpetrator could know, in order to make the ultimate "confession" appear credible on its face, or conversely, whether the suspect volunteered incriminating factual details previously unknown to the police.

In sum, recording interrogations electronically is—to quote a sergeant from the Hutto, Texas, police department—"fantastic . . . law enforcement's best friend." A Santa Clara, California, assistant district attorney concluded, "This reform benefits the accused to be sure, and its benefits to law enforcement and the people cannot be overstated."

Here is an underlying irony: despite the many benefits that electronic recordings provide to law enforcement and the criminal justice system, the major opponents of requiring custodial recordings are those who would benefit most from the practice—law enforcement officers and prosecutors who have not tried recording. Although they have no experience with this superior method of capturing what occurred during custodial interviews, many expound dire predictions of serious negative consequences that they believe will inevitably result if they are required to record. We have found that the speculations of law enforcement personnel who have not given recordings a try to be as repetitious as the glowing descriptions of the benefits of recordings received from those who record on a regular basis.

To their credit, some detectives and their supervisors, who once gave affidavits and testimony in opposition to recordings because of anticipated problems, later acknowledged openly that they changed their opinions after they began recording, and confirmed the wisdom of the practice.

Strangely, federal investigative agents are among the most prolific at spinning hypothetical theories as to why recording custodial interviews will seriously undermine their efforts to enforce the law. This is difficult to understand because federal agents routinely use sophisticated recording equipment in their investigations and at trials. Judges and juries have come to expect government agents to record suspect interviews in the controlled environment of custodial facilities. As a result, as we have explained elsewhere, federal agencies are beginning to experience backlash from their stubborn adherence to the old ways. "Federal Law Enforcement Should Record Interrogations," 53 *The Federal Lawyer* 44 (2006).

Recordings increase public trust in police conduct because they show that the police have nothing to hide.

As the benefits of electronically recording custodial interrogations become better known, the landscape is beginning to change; support is increasing, and opposition is decreasing. Courts and legislators are beginning to understand that they should support electronic recordings rather than stay neutral to them. As a result, more police and sheriff departments are voluntarily adopting the practice, more courts are endorsing it, and more state legislatures are enacting legislation mandating custodial recordings. We believe we are not engaging in undue optimism when we predict that the intelligent, forward-thinking heads of federal agencies will put an end to institutional, stubborn adherence to past practices and begin electronically recording felony suspects in custodial settings, as droves of their state and local counterparts are doing.

The routine criticisms made by non-recorders, including many of the federal agencies, are not shared by officers who actually record. One expressed concern is that recording will affect suspects' conduct by making them "clam up," refuse to cooperate, or on the flip side, "play to the camera." A related concern is that recordings will interfere with detectives'

efforts to "build rapport" with suspects. These concerns have proved to be unfounded. Federal agents and most state officers may record custodial interviews without the knowledge of the suspects, as permitted by law, although some departments advise suspects that the interviews are being recorded, and even place recording equipment in plain sight. We have repeatedly been told by experienced officers—both those who advise suspects of the recordings and those who do not—that in the vast majority of cases the suspect's knowledge or suspicion of a recording makes absolutely no difference to the suspect's cooperation. They remind us that, in our electronic age, most suspects expect to be recorded, and after a few minutes the suspects pay no attention even to exposed equipment. As to suspects' outright refusals to speak if recorded, the statutes and court rulings do not require that statements be recorded if suspects refuse; rather, when suspects decline to cooperate if recorded, a record is made of their refusal, and the officers proceed with handwritten notes.

We have learned from many experienced detectives that they are able to achieve a cooperative atmosphere whether or not the suspect knows of the recording, and that a need to build rapport without recording is without substance. To the contrary, we have often been told that offering suspects the opportunity to have the interview recorded usually results in cooperation because it demonstrates that the officers want an accurate and complete record of the suspects' stories in their own words.

It is becoming increasingly dangerous to record less than the complete custodial interviews because officers are exposed to cross-examination about why, with equipment readily at hand, they did not press the button and record the entire session. If the officers had nothing to hide, why was the beginning of the session excluded from the recording, which would provide indisputable proof as to what occurred?

Another concern sometimes expressed by opponents of recording is that judges and juries may disapprove of the tactics used. This is an inappropriate objection, because its underlying but unspoken premise is that the testifying officer should be able to avoid revealing what occurred during the custodial interview, despite the obligation to report the session fully and objectively, and to testify to the whole truth. It is an embarrassment that several federal agencies recently raised this objection to recording complete custodial interviews. Putting aside the serious ethical issues, we have not heard concerns on this subject from any of the more than 600 departments that record or the many prosecutors with whom we have spoken. Trial judges can prevent inappropriate reactions by juries by instructing the jury as to the interrogation tactics that are legal and those that are not. If jurors and judges are convinced of a suspect's guilt, they do not acquit because the officers engaged in permissible techniques. On the other hand, law enforcement officers should abide by the law, and unlawful tactics ought to be exposed, along with those who engage in them. Many departments, before undertaking recording as a policy, retain specialized trainers to explain methods officers may lawfully use, and those they may not, during recorded interviews. If recording prevents unlawful conduct, this can only benefit the system of justice.

Some opponents of recording argue that confessions may be lost if there are inadvertent problems that result in failures to record. This is another hypothetical objection, which has not been a problem for departments that have been recording for years. The statutes and decisions that require recording, as well as many departments' regulations, include provisions excusing recordings if there are inadvertent equipment failures, or if the officer mistakenly forgets to activate the equipment, or fails to operate the equipment properly.

Concerns about the cost of recording are also unfounded. Many small departments use inexpensive audio recording equipment. Many larger departments use video cameras, often concealed. Some have spent substantial sums for purchase, installation, and training. None has said the expense was unjustified or excessive. They realize there are larger savings in officers' time in preparing written reports, preparing to testify, and testifying about what happened during unrecorded interviews, as well as saving the time of prosecutors and judges. Recordings usually eliminate time-consuming motions to suppress or disputes at trial about whether *Miranda* warnings were given, improper tactics were used, or what was said by suspects. Guilty pleas rather than costly trials often result from recorded confessions and admissions, which preclude appeals and post-conviction litigation, resulting in savings in both state and federal trial and appellate courts. Gone also is the threat of civil litigation and judgments based on allegations of coercive tactics, failure to give warnings, and false testimony as to what occurred, as well as wrongful convictions of innocent defendants.

We have heard a concern about the costs of transcripts and storage (although new technology has substantially reduced storage costs), and who should bear these costs—the police or the prosecutors? But these costs are not deemed to be a reason to stop recording because of the far greater savings that result to the public treasury, and the increased efficiency and accuracy in law enforcement.

Although some have argued that requiring officers to record is an unwarranted slap at their integrity, not a single officer in a department that records has expressed such a complaint to us. To the contrary, we have repeatedly heard the opposite: Recordings help build public confidence in law enforcement agencies by eliminating unrecorded, closed-door stationhouse interrogations and placing all interrogations on the record, literally.

The FBI has retained an antiquated policy that expressly prohibits agents recording without advance supervisory approval.

The judicial and legislative branches of several states now require recording of custodial interrogations in serious felony investigations, and there is an ever-increasing number of departments that have voluntarily begun to record custodial stationhouse interviews from *Miranda* to the end. Alaska became the first in 1985, when its supreme court decided that the state constitution's due process clause required the police to record suspect interviews in felony investigations

conducted in police stations. *Stephan v. State*, 711 P.2d 1156, 1162 (Ala. 1985). Nine years later, in 1994, the Minnesota Supreme Court exercised its supervisory powers over the administration of criminal justice by ordering the police to record all stationhouse questioning of felony suspects. *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994). In 2004, Illinois became the first state to pass legislation on this subject, making unrecorded stationhouse interrogations presumptively inadmissible in homicide prosecutions, unless a statutory exception applies. 705 Ill. Comp. Stat. Ann. § 405/5-401.5 (West 2006); 725 Ill. Comp. Stat. Ann. § 5/103-2.1 (West 2006); 720 Ill. Comp. Stat. Ann. § 5/14-3(k) (West 2006). That same year, the Maine legislature directed police chiefs throughout the state to implement regulations for officers to record police station interviews of felony suspects. Me. Rev. Stat. Ann. tit. 25 § 2803-B(1)(K) (West 2006). In 2004, the Supreme Judicial Court of Massachusetts held that, if a criminal defendant's non-recorded statements are placed into evidence, the jury must be instructed that "the State's highest court has expressed a preference that . . . interrogations be recorded whenever practicable," and that if the defendant claims the statement was made involuntarily, the jury must also be instructed that it may (but need not) conclude from the police's failure to record the interrogation that the prosecution has not met its burden of proof that the statement was made voluntarily. *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004). This holding has resulted in most departments in Massachusetts now recording custodial interviews.

Year by year, the trend continues to grow: The District of Columbia, New Mexico, and (in response to a state supreme court decision) Wisconsin have passed legislation requiring that recordings be made of stationhouse interviews in a wide range of felony investigations. D.C. Code §§ 5-116.01-03 (2005); N.M. Stat. Ann. § 29-1-16 (West 2006); Wis. Stat. Ann. §§ 968.073, 972.115 (2005). The New Jersey Supreme Court exercised its supervisory rulemaking power to require the police to begin recording custodial felony interrogations, with strong cautionary jury instructions about unrecorded statements. N.J. Sup. Ct. R. 317 (2005). In *State v. Hajtic*, 724 N.W. 449 (Iowa 2006), the Supreme Court of Iowa made a strong statement in support of recording full custodial interviews. The state attorney general's office interpreted this decision to require recording, and the Iowa State Department of Public Safety has implemented a guideline requiring recording of interrogations conducted in detention facilities. And in August 2007, North Carolina became the most recent statewide convert, by enacting legislation requiring electronic recording of custodial interviews in homicide investigations. N. C. Gen. Stat. §15A-211 (2007), effective March 1, 2008.

Federal law enforcement agencies, however, continue to resist this trend. Despite their reputations as leaders in incorporating modern technology into criminal investigations, federal investigation agencies do not routinely record custodial interrogations. Indeed, the FBI has retained an antiquated policy that expressly prohibits agents recording without advance supervisory approval.

Federal judges, understandably impatient at having to spend precious time trying to reconstruct what happened during custodial interrogations, and facing skepticism from jurors about unrecorded statements, have been vocal in their criticism of these policies. A few years ago, district court

judge Charles B. Kornmann in South Dakota lamented the "abuse of judicial time" when he was forced to hear "another all too familiar case in which the FBI agent testifies to one version of what was said and when it was said[,] and the defendant testifies to an opposite version or versions," noting that "Despite numerous polite suggestions to the FBI, they continue to refuse to tape record or video tape interviews." *United States v. Azure*, No. CR 99-30077, 1999 WL 33218402, at *1 (D.S.D. Oct. 19, 1999). The judge announced that to remedy this situation in future cases in which the agent had no good excuse for not recording, he would "explain to the jury that FBI agents continue to refuse to follow the suggestions of [the district court judges] and why, in the [opinion] of the court, they refuse to follow such suggestions." *Id.* at *2. Chief Judge Mark W. Bennett of the Northern District of Iowa threatened to begin issuing similar admonitions to the jury because the failure to record interrogations results in a "proliferation" of motions to suppress that would be "unnecessary if the [D.E.A.] officers had videotaped or otherwise recorded their interaction with the defendant." *United States v. Plummer*, 118 F. Supp. 2d 945, 947 (N.D. Iowa 2000).

The practice of recording interviews will avoid the waste of resources caused by a lack of a verbatim record.

District Court Judge William C. Lee in the Northern District of Indiana told a local police officer-witness, "If you've got audio and videotape there, I think you ought to use it. I don't know why I have to sit here and sort through the credibility of what was said in these interviews when there's a perfect device available to resolve that and eliminate any discussion about it. . . . We shouldn't be taking up the federal court's time of an hour and a half this morning and a couple of hours in the other case trying to figure out who said what to whom when in these interviews because there's no videotape of them." *United States v. Bland*, No. 1:02-CR-93 (N.D. Ind. Dec. 13, 2002).

District Court Judge Stephen P. Friot from the Western District of Oklahoma wrote us: "I find it ironic that if the cost of repairing a car is at stake in a civil case, the defendant's account of the matter (i.e., his deposition) is meticulously recorded, but agencies with ample opportunity and resources to do so fail to record statements where liberty or perhaps even life are at stake."

While the courts of several states have played an integral role in causing police agencies to begin recording, and many agencies have voluntarily adopted the practice, it is our opinion that state legislatures should take the lead in mandating recording. One obvious advantage is the legislatures' ability to provide funds for equipment and training, just as the Illinois legislature did. *See* 20 Ill. Comp. Stat. Ann. § 3930/7.5 (grants for equipment); 50 Ill. Comp. Stat. Ann. § 705/10.3 (funds for training). While the equipment can be as simple and inexpensive as a portable tape recorder, legislatures may decide that law enforcement will reap the maximum benefits through more sophisticated recording technology: for example, soundproof interrogation rooms equipped with hidden digital video cameras connected to a central command center, especially in large urban centers and high crime areas. Other expenses are involved, such as training officers how to conduct recorded interrogations and transcribing the recorded statements.

A powerful advantage of legislative action is the development of a statewide uniform, comprehensive set of rules and exceptions for the guidance of law enforcement. For example, the Alaska and Minnesota Supreme Courts ruled that interrogations must be recorded, but did not deal in detail with situations involving equipment failure, officers forgetting to begin the recorder, suspects who refuse to cooperate while being recorded, or interviews of suspects at the crime scene or in police cars. After such a ruling, the judiciary explores its contours over time through a series of cases with varying fact patterns. In contrast, the legislature is able to consider and make rules in advance for these and other instances, with input from both police and defense, including adapting existing eavesdropping laws, as Illinois did. If law enforcement officers know exactly what the rules are, they are better able to avoid the risk of having valid confessions suppressed as evidence. Statewide legislation will prevent police practices from being different from one county to the next, and will assist in assuring admissible evidence that is obtained through cooperation among law enforcement agencies.

The National Conference of Commissioners on Uniform State Laws has recently approved formation of a drafting committee on electronic recording of custodial interrogations. This may well lead to a national effort to achieve uniform statutes requiring recording, which will benefit all participants in the criminal justice system who are devoted to equitable enforcement of the laws, to convicting the guilty, and to avoiding the risk of prosecuting the innocent.

We know that innocent people sometimes confess to crimes that they did not commit. We know, too, that guilty persons often falsely accuse police of using improper tactics, or of misstating what occurred. Without a complete record of the interrogation, we are not always able to detect the truth, creating the risk that guilty persons are acquitted, and innocent persons convicted. The time-consuming fact-sensitive inquiries required to determine precisely what statements were made, and whether they were voluntary, become unnecessary with a complete electronic record. The simple and commonsense practice of recording custodial interviews at police facilities will avoid the waste of resources caused by a lack of a verbatim record.

A deputy chief district attorney in Tarrant County, Texas, correctly said that electronic recordings are the "wave of the future." Indeed, they are the wave of the present. All members of the criminal justice system—judges, defense attorneys, prosecutors, and police officers—are beginning to realize the enormous benefits that they receive from recording stationhouse interrogations. There is a growing trend among state legislatures and courts to require electronic recording of custodial interrogations in police facilities, and among law enforcement agencies to do so voluntarily even though it is not required. We all should encourage this trend.